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OFFICE OF PETITIONS

In re Patent No. 7,199,280 : DECISION ON REQUEST
Te Riele et al. : FOR
Issue Date: 04/03/2007 : RECONSIDERATION OF
Application No. 09/884,877 : PATENT TERM ADJUSTMENT
Filed: 06/20/2001 :
Atty Docket No. :
033730-0102 :

This is a decision on the petition filed on June 2, 2011, which is being treated as a request for reconsideration under 37 CFR 1.705(d) requesting that the patent term adjustment indicated on the above-identified patent be corrected to indicate that the term of the above-identified patent is extended or adjusted by one hundred thirty-nine (139) days.

The petition to correct the patent term adjustment is **DISMISSED** with respect to making any change in the patent term adjustment determination under 35 U.S.C. § 154(b) of zero (0) days.

Patentees dispute the period of time excluded from B delay for appellate review. Patentees' argument has been considered, but not found persuasive. The period consumed by appellate review, whether successful or not, is excluded from the calculation of B delay. See 35 U.S.C. 154(b)(1)(B)(ii). An appeal to the Board of Patent Appeals and Interferences commences with the filing of a notice of appeal. See 35 U.S.C. 134(a). Generally, an appeal to the Board of Patent Appeals and Interferences ends with either 1) a Board decision, 2) the examiner reopening prosecution and issuing another Office action, or 3) the applicant filing a request to withdraw the appeal and reopen prosecution (e.g., the filing of a request for continued examination). In this instance the period consumed by appellate review is 209 days, consisting of the period beginning on June 23, 2005, the date of filing of the notice of appeal and ending on January 18, 2006, the date before the date the subsequent

request for continued examination (RCE) was filed. Thus, B delay is 367 (576 - 209) days.

It is noted that the Office issued a Notice of proposed rulemaking entitled *Revision of Patent Term Extension and Adjustment Provisions Relating to Appellate Review and Information Disclosure Statements*, 76 FR 18990 (April 6, 2011). To the extent that the final rule on *Revision of Patent Term Extension and Adjustment Provisions Relating to Appellate Review* revises the interpretation of appellate review applied in this decision, Patentees are given **one (1) month or thirty (30) days**, whichever is longer, from the date of the final rule to file a request for reconsideration. No extensions of time will be granted under § 1.136.

Nothing in this decision shall be construed as a waiver of the requirement of 35 U.S.C. 154(b)(4) that any civil action by an applicant dissatisfied with a determination made by the Director under 35 U.S.C. 154(b)(3) be filed in the United States District Court for the District of Columbia within 180 days after the grant of the patent.

Patentees assert that a 42 day period for Office delay pursuant to 37 CFR 1.702(a)(1) and a 20 day period for Office delay pursuant to 37 CFR 1.702(a)(4) are warranted. These periods have been previously included in the patent term adjustment and are reflected in the calculation in the following paragraph.

In view thereof, the determination of patent term adjustment at the time of issuance is zero (0) days (429 of applicant delay (62 (42 + 20) days of "A" delay + 367 days of "B" delay)) reduced by 499 days of applicant delay)

The Office acknowledges submission of the \$200.00 fee set forth in 37 CFR 1.18(e). No additional fees are required.

Telephone inquiries specific to this matter should be directed to the undersigned at (571) 272-3231.



Douglas I. Wood
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Office of Petition